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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 367

FEDERAL POWER COMMISSION, Petitioner,

v.

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 1035) is reported in 211 F.2d 347; the opinion and order of the Federal Power Commission granting the license (R. II, 417-447) are reported at 92 P.U.R. (N.S.) 247.

JURISDICTION

The order of the Court of Appeals was entered February 18, 1954 (R. 1034). The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act

and 28 U. S. C. Section 1254 (1), 49 Stat 860, 16 U. S. C. 825 (1).

QUESTIONS PRESENTED

1. Did the Federal Power Commission have jurisdiction, power, and authority to authorize and to license the construction, operation, and maintenance of the proposed project in the absence of state authority to use, impound, and divert the waters of the Deschutes River, an internal, nonnavigable stream of the State of Oregon?

2. Did the United States Constitution delegate to the central government power to control the acquisition and use of nonnavigable streams?

3. Whether under the Desert Land Act of 1877 the Federal Government irrevocably and unconditionally surrendered or relinquished to the states, including the State of Oregon, whatever rights the government may have had to control the use of the waters of nonnavigable streams?

4. Whether under the Desert Land Act of 1877 the common law doctrine of riparian rights have been abrogated in Oregon?

5. Whether the Federal Power Commission may act as a substitute for the local authorities over such questions as the right to use, appropriate, divert, or impound the waters of nonnavigable streams?

6. Whether an applicant for a license under Section 9 (b) of the Federal Power Act must show the Federal Power Commission he has under the state law the right to divert the waters of a nonnavigable stream for the use of which he desires a license?

STATUTES INVOLVED

The statutes involved are adequately set forth in the Appendix to the Petition.

ADDITIONAL STATEMENT

The Deschutes is an interior, nonnavigable river of the State of Oregon and is a tributary of the Columbia River (R. 330). A setting forth of some general facts relative to the geography, topography and stream flow may be helpful in understanding the issues of this case.

The Deschutes River rises near the summit of the Cascade Range and flows northward along the foot of the eastern slope to join the Columbia River at a point about 15 miles upstream from The Dalles, Oregon. The drainage basin, with an area of about 10,500 square miles, has a shape somewhat like an inverted Y, and Little Deschutes River forms the drainage pattern of the western arm. Twenty miles below its junction with Little Deschutes River, the main stream flows through Bend, the most important city in the basin (R. 327).

About 55 miles north of Bend, two important tributaries, the Metolius and Croked Rivers join the main stream, from the west and east, respectively, and at that point the flow from springs greatly augments the run-off which is depleted by irrigation diversions above Bend. Only two other important tributaries, Warm Springs River and White River at mile 84 and mile 47, respectively, enter the stream below Bend. Most of the basin is covered with timber, and this timbered area includes all of Deschutes National Forest, and portions

of Mt. Hood and Ochoco National Forests. Topography of the basin is generally broken and rugged, except for the Central Oregon plateau and the comparatively level bench lands in the mid-valley section. Throughout the lower 130 miles, the river flows in a narrow canyon with an average fall of 17.6 feet to the mile. The agricultural lands consist largely of high table lands cut by deep canyons through which the rivers flow and small arable areas which border the streams. The soil is a coarse, disintegrated lava and the rocks of the entire area are volcanic and very porous. The river valley varies in width from 200 to 1,200 feet (R. 328).

The geological formations, being porous in nature, act as underground reservoirs regulating run-off from the basin. The Deschutes River has perhaps the most uniform flow of any river of comparable size in the Columbia River Basin, and has a maximum discharge near Madras, which is in the vicinity of the proposed project, of about 13,300 cubic feet per second, the minimum at the same point being about 2,900 cubic feet per second. The mean annual run-off near Madras is 3,011,800 acre-feet, and the average flow is about 4,200 cfs (R. 328).

Flow in the Deschutes is remarkably uniform, and because of the geological conditions in the basin, large floods are not regarded as probable in any part of the basin except on Crooked River, which enters the Deschutes from the east at mile 113, or about 10 miles above the proposed project. No floods causing major damage are known to have occurred (R. 328).

Metolius and Warm Spring Rivers are the principal

salmon supporting tributaries of Deschutes River. These streams support runs of spring chinook salmon and steelhead trout. Falls and dams above the confluence of Metolius River block the upstream passage of anadromous fish. The Oregon Fish Commission has constructed and put into operation a salmon hatchery on Metolius River. The Deschutes River has numerous rainbow, cutthroat, German brown trout, steelhead and salmon and is nationally known for its sport fishing (R. 329).

Seasonal low flows of Deschutes River and its tributaries above Bend are completely appropriated and are used primarily for irrigation of lands lying east of the river (R. 329).

The proposed project would occupy lands of the United States and would affect the Warm Springs Indian Reservation (R. 331) (433).

On January 20, 1949, four months prior to the filing of its application with the Federal Power Commission, the Northwest Power Supply Company filed with the Hydroelectric Commission of Oregon an application for a preliminary permit, Project No. 170, commonly known as the Pelton Project, for authority to appropriate 7,040 cubic feet per second of water from the Deschutes River for the purpose of developing 120,000 theoretical horsepower under a head of 150 feet and to construct a dam and powerhouse at the Pelton Site.

This application was filed in compliance with the terms of Oregon Revised Statutes Sec. 543.110 et seq., which, in substance, provides that no water-power project involving the right to use or appropriate the waters

of any rivers or other bodies of water within the State of Oregon, for the generation of electricity shall be begun or constructed except in conformity with the provisions of said Act, which, among other things, provides for the issuance of a preliminary permit by the Oregon Hydro-electric Commission before any such water-power project shall be initiated.

Oregon Revised Statutes Sec. 509.640, provides in substance that in the event any person desires to construct a dam in any of the streams of Oregon to a height that will make a fish ladder or fishway thereover impracticable in the opinion of the Oregon Fish Commission, then such person may make an application to the Commission for a permit to construct the dam. The Oregon Fish Commission is authorized to grant such permit in its discretion on the condition that the person so applying for such permit shall convey to the State of Oregon a site of the size and dimensions satisfactory to the Fish Commission, at such place as may be selected by said Commission, and shall erect thereon a hatchery residence in accordance with plans and specifications to be furnished by the Commission. The act further provides that such person shall enter into an agreement with the Commission secured by bond to furnish all water and light without expense, to operate said proposed hatchery. This act further provides that the Fish Commission shall not issue a permit for the construction of any such dam until the person applying for such permit shall have actually conveyed said land to the State and shall have erected said hatchery and hatchery resi-

dence thereon in accordance with said plans and specifications.

BRIEF OF AUTHORITIES

I

The rivers and streams of water in the territory of Oregon in which salmon are found shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.

Act of Congress (August 14, 1848, Territory of Oregon Act.) 9 Stat. L. Sec. 12, Ch. 177, p. 328.

II

"All laws in force in the territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force until altered or repealed."

Article XVIII, Sec. 7, Constitution of Oregon, 1859.

III

In the event that any person desires to construct a dam in any of the streams of this state to a height that will make a fish ladder or fishway thereover impracticable, in the opinion of the commission, then such person may make an application to the commission for a permit to construct such dam, and the commission is hereby authorized to grant such permit in its discretion, upon the condition that the person so applying for such permit shall convey to the state of Oregon a site of the size and dimensions satisfactory to the commission, at such place as

may be selected by the commission, and erect a hatchery and hatchery residence, according to plans and specifications to be furnished by the commission, and enter into an agreement with the commission, secured by a good and sufficient bond, to furnish all water and light without expense, to operate said proposed hatchery; and no permit for the construction of any such dam shall be given by the commission until the person applying for such permit shall have actually conveyed said land to the state and erected said hatchery and hatchery residence in accordance with said plans and specifications.

Oregon Revised Statutes Sec. 509.640.

IV

The common-law doctrine of riparian rights has been virtually abrogated in Oregon and for practical purposes appears to be no longer more than a legal fiction.

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 164, 79 L. Ed. 1356,

Jennison v. Kirk, 98 U.S. 453, 25 L. Ed. 240,

Atchison v. Peterson, 20 Wall. 507, 22 L. Ed. 414.

V

All waters within the state (Oregon) from all sources of water supply belong to the public.

Oregon Revised Statutes Sec. 537.110

VI

The above section abolishes the rule that a riparian owner has the right to have a stream continue to flow substantially undiminished in its natural channel.

California-Oregon Power Co. v. Beaver Portland Cement Co., 73 Fed. 2nd 555.

The common-law rule as to "continuous flow" of a stream, or riparian doctrine, may be changed by statute except as such change may affect some vested right.

Re: Water Rights of Hood River, 114 Or. 112, 227 P. 1065.

VII

The Oregon water code has been sustained as constitutional by the Supreme Court of the United States.

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 79 L. Ed. 1356.

VIII

The rights, title and interest in and to all water for the development of waterpower and to water power sites, which the state of Oregon now owns or may hereafter acquire, shall be held in perpetuity.

Article XI-D, sec. 1, Constitution of Oregon, 1859.

IX

The Desert Land Act (Act of Congress, March 3, 1877, amended 42, U.S.C.A. 321) had the effect to sever all waters upon the public domain, not theretofore appropriated, from the land itself.

California-Oregon Power Co. v. Beaver Portland Cement Co.

Brush v. Commissioners of Internal Revenue, 300 U.S. 352.

Ickes v. Fox, 300 U.S. 82, 57 S.Ct. 412.

X

Under the federal Acts of 1866, 1870 and 1877 (Title 43, Section 661, United States Code annotated (14 Stat. 251, 16 Stat. 217)) the federal government irrevocably and unconditionally surrendered or relinquished to the states whatever rights the government may have had to control the use of waters of nonnavigable streams in the West.

Jennison v. Kirk, 98 U.S. 453, 25 L. Ed. 240,

California-Oregon Power Company v. Beaver Portland Cement Company, 295 U.S. 142, 55 S. Ct. 725,

Atchinson v. Peterson, 20 Wall. 507, 22 L. Ed. 414,

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Broder v. Natoma Water and Mining Company, 11 Otto 274, 25 L. Ed. 790,

United States v. Rio Grande D. & I. Company, 174 U.S. 690, 706, 19 S. Ct. 770,

Gutierres v. Albuquerque Land & Irrigation Company, 188 U.S. 545, 553, 23 S. Ct. 338.

XI

The power to legislate on the question of the acquisition and control of water rights has never been delegated to the United States and hence such power properly belongs to the individual states.

Kansas v. Colorado, 206 U.S. 46, 94,

Fox v. Ickes, 137 Fed. 2nd 30.

XII

From and after the date when this act takes effect no right to appropriate or to use the waters of the lakes, rivers, streams or other bodies of water within the state of Oregon, including water over which this state has concurrent jurisdiction, in connection with the development of any water-power project for the generation of electricity, shall be initiated, perfected, acquired or held, except for and during the period or periods or extensions thereof as herein stated, and pursuant to the provisions hereof. (Ore. L. 1931, ch. 67, sec. 2, p. 82)

Oregon Revised Statutes Sec. 543.110 et seq.

XIII

The refusal of the Fish Commission of Oregon and the Oregon Hydroelectric Commission to approve the Pelton Project is an absolute bar to the licensing of the proposed project. Sec. 9 (b) Federal Power Act (16 U.S. C.A. 802 b.)

First Iowa Hydro-electric Cooperative v. Federal Power Commission, 328 U.S. 152

State of Iowa v. Federal Power Commission, 399 U.S. 979.

XIV

Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law.

Federal Power Commission v. Niagara Mohawk Power Corporation, 347 U.S. 239, 74 S. Ct. 487.

XV

The legislative history of the Federal Power Act compels conclusion that it was not intended to automatically abolish pre-existing water rights on a nationwide scale, but that it was intended to be merely regulatory.

Federal Power Commission v. Niagara Mohawk Power Corporation, 347 U.S. 239, 74 S. Ct. 487.

SUMMARY OF ARGUMENT

1. The decision below is in accord with the well recognized, long standing principles laid down by this court. The court below decided no question in a manner not consistent with the interpretation of the Federal Power Act in prior decisions of this court. The decision below is consistent with the decision of this court in the recent case of *Federal Power Commission v. Niagara Mohawk Power Corporation*, 347 U.S. 239, 74 S. Ct. 487, and with those earlier decisions in *California-Oregon Power Company v. Beaver Portland Cement Company*, 295 U.S. 162, 55 S. Ct. 731, and in *Ickes v. Fox*, 300 U.S. 82, 57 S. Ct. 412. The decision below decided no important

question of federal law which has not, but should be, settled by this court.

2. The decision of the court below is not in conflict with the decision of another court of appeals. It is in accord with the laws of the state of Oregon.

3. The court below correctly held that:

a. By adoption, under Federal Power Act, of policy that Federal Power Commission is to work toward a constructive national program of intelligent, economical utilization of power resources, Congress did not and could not change state ownership or control of waters located within state.

b. Within certain limitations, sovereignty of Oregon extends over control of waters located within Oregon as definitely as over lands therein, but the federal government, has paramount rights in navigable streams under the commerce clause.

c. As owner of public domain, federal government possessed power to dispose of land and water thereon together or to dispose of them separately, and fair construction of the Desert Land Act is that Congress intended to establish rule that, for the future, land should be patented separately and that all nonnavigable waters thereon should be reserved for the use of public under laws of state and territories named.

d. Regulation of the Deschutes River as it flows through Oregon is one of powers of Oregon's sovereignty, and such power includes power to regulate fish in Oregon waters.

e. Whatever, if any, limitation there was upon Oregon's complete sovereignty over waters of the Deschutes River was wiped out by the Desert Land Act of 1877.

f. The Federal Power Commission had legal right to give its approval to the construction of a hydroelectric plant on the Deschutes River in Oregon and had power to grant its permissive license to construction of such proposed dam upon federal property, but ownership of power dam site did not empower federal government to use waters of such river either at such site or elsewhere contrary to Oregon law.

In view of Rule 19 of this court which sets forth the possible grounds for granting certiorari, though neither controlling nor fully measuring the court's discretion, are indeed persuasive, surely this court will not, in the absence of any of such grounds, grant the writ of certiorari.

ARGUMENT

The respondents contend that under the Desert Land Acts (43 U.S.C.A. 321), the Federal government irrevocably and unconditionally surrendered and relinquished to the State of Oregon whatever rights the government may have had to control the use of the waters of its nonnavigable streams; that common law rule as to "continuous flow" of a nonnavigable stream, or riparian doctrine, has been changed by statute and laws of the State of Oregon; that said Desert Land Acts had the efect to sever all waters upon the public domain from the land itself; that the rights, title and interest in and to all waters of the State, and the right to regulate its use, are vested in the State; that the State of Oregon has refused to license the proposed project; that under Section 9b of the Federal Power Act (16 U.S.C.A. 802b), the refusal of the State to approve the project is an absolute bar to the licensing of the project by the Federal Power Commission.

From the system of state control, enormous property rights have been developed in the West. This Court has recognized that rights of water secured in conformity with state laws are vested property rights. There is no provision in the federal constitution delegating to the central government power to control the acquisition and use of nonnavigable streams. The government, recognizing this position, has on occasion claimed that the United States has proprietary title in water and hence full power to dispose of and regulate such waters.

In the case of *Kansas v. Colorado*, 206 U.S. 46, the United States invoked this provision (Clause 2, Section 3, Article IV, United States Constiution) in support of its claim of national control as asserted in that case. The Court there, after referring to the constitution provision said (p. 89): "The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. * * * clearly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits."

Referring to this constitutional provision, i.e., power in the federal government to control the acquisition and use of water it was said in *Ashwater v. Tennessee Valley Auhtority*, 297 U.S. 288, 388, 56 S. Ct. 466:

> "The constitutional provision is silent as to the method of disposing of property belonging to the United States. That method, of course must be an appropriate means of disposition according to the nature of the property, it must be one adopted in the public interest as distinguished from private or personal ends, and we may assume that it must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the states."

The state has taken the position that under the Federal Acts of 1866, 1890 and 1877, the federal government irrevocably and unconditionally surrendered or relinquished to the states whatever rights the government

may have had to control the use of the waters of non-navigable streams in the West. The first of these federal Acts, that of July 26, 1866 (14 Stat. 251) and the second, that of July 9, 1870, (16 Stat. 217), are codified together as Section 661, Title 43, United States Code, which reads as follows:

> "Whenever, by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purpose herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.
>
> "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section."

The first paragraph of the above quoted section is from the original Act of 1866. The second paragraph is from the amendatory Act of 1870 and had for its purpose the clarification of the 1866 statute.

The third pertinent federal Act is the so-called

"Desert Land Law" (Act of March 3, 1877, as amended, 43 U.S.C.A. 321), which, after providing for desert land entries, reads as follows:

> "* * * Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

Section 2 and section 3 of this 1877 Act (19 Stat. 377) further provides:

> "Section 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated—
>
> "Section 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may

> be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

The historical background of the Acts of 1866, 1870 and 1877 has been related many times. *Jennison* v. *Kirk*, 98 U.S. 453, 25 L. Ed. 240, decided in 1879 contains an account of the 1866 law by Justice Field who did much to mold the form of the earlier decisions. It was there said (*Jennison* v. *Kirk*, *supra*): "The doctrines of the common law respecting the rights of riparian owners were not considered as aplicable, or only in a very limited degree, to the condition of miners in the mountains."

With reference to the 1866 Act the decision had this to say:

> "It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached."

A more recent decision, *California-Oregon Power Company* v. *Beaver Portland Cement Company*, 295, U.S. 142, 55 S. Ct. 725, decided in 1935 reviews the conditions in the West which lead to the passage of these three federal Acts and states (295 U.S. 157-158):

> "The streams and other sources of supply from which this water must come were separated from one another by wide stretches of parched and barren land which never could be made to produce

> agricultural crops except by the transmission of water for long distances and its entire consumption in the process of irrigation. Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation. And this substitution of the rule of appropriation for that of the common law was to have momentous consequences. It became the determining factor in the long struggle to expunge from our vocabularly the legend "Great American Desert" which was spread in large letters across the face of the old maps of the far west."

In *Atchinson* v. *Peterson,* 20 Wall. 507, 22 L. Ed. 414, Justice Field after referring to the silent acquiescence of the United States in permitting the occupation of the public lands for mining and appropriation of water in connection with those operations said (22 L. Ed. 416, 20 Wal., 507, 513): "This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866."

In *Basey* v. *Gallagher,* 20 Wall. 670, 683, 684; 22 L. Ed. 452, the same judge referred to the 1866 Act and said:

> "It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or the decisions of the courts."

In *Broder* v. *Natoma Water and Mining Company*, 11 Otto 274, 276; 25 L. Ed. 790, it was held that the Act of 1866 was "rather a voluntary recognition of the pre-existin right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

In *United States* v. *Rio Grande D. & I. Company*, 174 U.S. 690, 706, 19 S. Ct. 770, it was said: "Obviously by these acts so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow."

Likewise *Gutierres* v. *Albuquerque Land & Irrigation Company*, 188 U.S. 545, 553, 23 S. Ct. 388, held:

> "By the Act of March 3, 1877, c. 107, 19th Stat. 377, the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, was granted * * *".

In the case of *California-Oregon Power Company* v. *Beaver Portland Cement Company (supra)*, the power company which had appropriation rights from interfering with the water of Rogue River in Oregon. The Court reviewed at length the conditions in the West which lead to the passage of the Acts of 1866, 1870 and 1877, and commended upon these Acts and the decisions construing them. The decision reached was that the appropriation rights of the defendant were good and hence the injunction could not issue. The Court thus summarized its decision (295 U.S. 142, 163, 55 S. Ct. 725):

> "What we hold is that following the Act of 1877, if not before, all nonnavigable waters then a part of

> the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."

The doctrine of the California-Oregon Power Company decision has been reiterated in two subsequent opinions of the United States Supreme Court. We quote from *Ickes* v. *Fox*, 300 U.S. 82, 95, 57 S. Ct. 412, wherein it was said:

> "The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water right; but all nonnavigable waters were reserved for the use of the public under the laws of the various arid-land states."

This same controversy involving the Yakima project in the State of Washington, came before the United States Court of Appeals for the District of Columbia ard a decision was rendered by that court on June 30, 1943. The Secretary of Interior attempted to limit the amounts of water which the farmers could secure under contracts with the Bureau of Reclamation to 3 or 3½ acre-feet per

acre and to impose an additional charge if more water was desired. The Secretary had urged that the United States was an indispensable party, but the Supreme Court ruled otherwise holding (300 U.S. 82, 95, supra) that the appropriation of water was not for the use of the Government, but, under the Reclamation Act, for the landowners, and that the Government was simply a carrier and distributor of water with a lien upon the land and the water rights as security to assure the repayment of the cost of construction and maintenance. The United States Court of Appeals (*Fox* v. *Ickes*, 137 F.2d 30) ruled against the Secretary, holding that in the operation of the project he is in the position of a carrier of water to all entrymen under the project and that "he must distribute the available water according to the priorities among the different users which are established by the law of the State of Washington." The Appellate Court went on to say that "the amount of water, to which appellants are entitled by reason of prior appropriations for beneficial use can only be finally determined by a court of the State of Washington."

The only true ownership in water is one of a right to use. Neither the United States nor any individual state can possess a true title unless and until a beneficial use of the water is made. This use is exercised by an individual, a group of individuals, or a legal entity through beneficial application of the water in compliance with state laws.

The effect of the dedication of the waters of the state to the state or to the people confers no ownership of title

in the running waters flowing within such respective jurisdiction. Neither the United States, a state, nor an individual can, under the law, acquire any absolute ownership or title to the waters flowing in their natural channels. The only right that can be acquired by any one is usufructuary. Again, such a dedication confers upon the state no absolute title or right even to the use of such waters. The public ownership, if any distinction is made, is rather of sovereign than that of a proprietor. Therefore, such a dedication confers upon the state the power of administration or regulation of the waters flowing within its boundaries, and also the power of regulating the appropriation and use of such waters as between the respective individual claimants thereto. In other words, the state acts under this terms of dedication in its sovereign capacity only, and not as proprietor or owner of the water.

A constitutional and statutory provision dedicating water to the public should be construed as meaning the same as the phrase publici juris, that the water is a wandering thing whose corpus is incapable of ownership either by the state or the United States, the utmost right being usufructuary and subject to acquisition by any member of the public first applying in conformity with state regulations.

These principles are in strict conformity with the 1935 decision of the United States Supreme Court in California-Oregon Power Company (supra), wherein it was said that by virtue of the Act of 1877, if not before,

the waters of nonnavigable streams "became publici juris subject to the plenary control of the designated states."

Section 543.110, Oregon Revised Statutes, provides as follows:

From and after the date when this act takes effect no right to appropriate or to use the waters of the lakes, rivers, streams or other bodies of water within the state of Oregon, including water over which this state has concurrent jurisidiction, in connection with the development of any water-power project for the generation of electricity, shall be initiated, perfected, acquired or held, except for and during the period or periods of extensions thereof as herein stated, and pursuant to the provisions hereof.

Section 543.120, Oregon Revised Statutes, reads as follows:

From and after the taking effect of this act, no water-power project involving the use of the waters of any of the lakes, rivers, streams or other bodies of water within the state of Oregon, including water over which this state has concurrent jurisdiction, for the generation of electricity, shall be begun or constructed except in conformity with the provisions hereof.

Federal Government has only such powers as are delegated to it by the United States Constitution. All powers not so delegated are by the express provisions of the Tenth Amendment reserved to the states. The power to legislate on the question of acquisition and control of water rights in nonnavigable streams has never been delegated to the United States and hence such power

properly belongs to the individual states. This position was definitely decided in *Kansas* v. *Colorado* (supra), wherein it is said:

> "It (a state) may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the west of the appropriation of waters for the of irrigation shall control. Congress cannot enforce either rule upon any state."

This principle was followed in the California-Oregon Company case (supra), the court holding that: "The full power of choice must remain with the state." To the same effect are *United States* v. *Rio Grande Dam and Irrigation Company*, 174 U.S. 690, and *Gutierres* v. *Albuquerque Land and Irrigation Company*, 188 U.S. 545.

The State of Oregon, by constitution and statute in the adoption of its water code, has determined this right in favor of the appropriation doctrine. Oregon Revised Statutes 537.110; Article 11-D, sec. 1, Constitution of Oregon, 1859.

Constitution Article 11-D, section 1, Oregon Constitution, provides the rights, title and interest in and to all water for the development of waterpower and to water power sites, which the State of Oregon now owns or may hereafter acquire, shall be held in perpetuity.

Oregon Revised Statutes 537.110 provides:

> "All waters within the state (Oregon) from all sources of water supply belong to the public."

Under the laws of this state, applicant may not appropriate or use the water of the state in connection with

the development of any waterpower project for the generation of electricity without first having obtained from the Hydroelectric Commission of the State of Oregon a license so to do.

The Federal Power Commission has no authority to grant to the Portland General Electric Company, the applicant, a license to construct the project in question until the applicant has complied with section 9 (b) of the Federal Power Act by showing compliance with the laws of the State of Oregon.

This proposition was decided by this court in *First Iowa Hydroelectric Cooperative* v. *Federal Power Commission*, 328 U.S. 152 (1946). The supersedure by the Federal Power Act of conflicting state laws was further emphasized by the denial of certiorari when the State of Iowa attempted for the second time to impose its own statute in opposition to the federal license for this project, *State of Iowa* v. *Federal Power Commission*, 399 U.S. 979 (1950), in which certiorari was denied thereby affirming the decision of the United States Court of Appeals for the Eighth Circuit, affirming order of the Commission granting the license. 178 Federal 2d, 421 (1949).

In the first Iowa Hydroelectric case (supra), petitioner applied to the Federal Power Commission for a license for a power project in Iowa involving the construction of a dam on a navigable* stream and the diversion of water from two navigable* streams into another. Petitioner showed no attempt to comply with the Iowa Code, 1939, chapter 363, which forbids the construction of dams and the diversion of water for industrial purposes without a

permit from the State Executive Council and authorizing the issuance of such permit upon the finding inter alia, that "any water taken from the stream * * * is returned thereto at the earliest practicable place." The State intervened and urged that the application be denied because the petitioner did not submit evidence of its compliance with the requirements of the Iowa Code for a permit from the State Exectuive Council. The Federal Power Commission found that a federal license for the project was required under the Federal Power Act and that the project called for practical and reasonably adequate water power development with certain recreational advantages, all at a cost not appearing to be unreasonable; but it dismissed the application without prejudice on the ground of petitioner's failure to present satisfactory evidence, pursuant to section 9 (b) of compliance with requirements of the laws of Iowa requiring a state permit.

The Court held that compliance with the requirements for a state permit under the Iowa Code is not a condition precedent to, or an administrative procedure that must be exhausted before, securing a federal license. In discussing this point the Court said: "It is the Federal Power Commission rather than the Iowa Executive Council that, under our constitutional government, must pass on issues affecting the use of *navigable** waters—on behalf of the people as well as on behalf of all others." (p. 182)

The securing of an Iowa State permit is not in any sense a condition precedent or an administrative procedure that must be exercised before securing a federal

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* Emphasis supplied.

license. It is a procedure required by the State of Iowa in dealing with its local streams and also the water of the United States within that state in the absence of an assumption of jurisdiction by the United States over the *navigability** of its waters. Now that the federal government has taken jurisdiction of such waters (navigable waters) under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements." (p. 170)

In the Niagara Mohawk Case (supra) the United States Court of Appeals in rejecting the contention of the petitioner that the Federal Power Act had superseded state water laws said (p. 32):

> "Much of the difficulty in this case has arisen from what we regard as a misconception of the Water Power Act and of the nature of licenses issued thereunder. The Act is purely a regulatory measure. A federal license is not an original grant of authority, but a permission to use a state's grant of authority. To be sure, a license is a prerequisite in that water rights under state law in a navigable stream may not be exercised without one, as the Supreme Court held in the New River case. And when state law or regulation conflicts with the Act, or with any lawful federal regulatory action, or with lawful terms of a federal license, state authority must yield to federal, as the Supreme Court held in the First Iowa case. But these considerations do not by any means require the conclusion that the Act and a license thereunder constitute the source from which all water rights flow. An applicant for a

* Emphasis supplied.

> license must show the Commission he has under state law the right to divert the water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him."

This court in affirming the decision of the lower court in that case said (p. 495):

> "The references in the Act to pre-existing water rights carry a natural implication that those rights are to survive, at least until taken over by purchase or otherwise. Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that Act.
>
> The legislative history of the Act discloses no sustantial support for the drastic policy which the Commission seeks to read into it. To convert this act from a regulatory Act to one automatically abolishing pre-existing water rights on a nation-wide scale calls for a convincing explanation of that purpose. We find none. In fact, the legislative history point the other way."

In the dissenting opinion Mr. Justice Douglas (p. 498) stated "And I agree that the Federal Power Act was not intended to interfere with water rights created by state law."

The decision of the lower court in the instant case, in rejecting the same contentions of the petitioner as was made in the Niagara Mohawk case, relied in part on the decision of this court in the Niagara Mohawk case (p. 354).

CONCLUSION

For the above reasons, the peition for write of certiorari should be denied.

Respectfully submitted,

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October, 1954

BRIEF FOR RESPONDENTS

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No. 367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL POWER COMMISSION, Petitioner,

v.

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 1035) is reported in 211 F.2d 347; the opinion and order of the Federal Power Commission granting the license (R. II, 417-447) are reported at 92 P.U.R. (N.S.) 247.

JURISDICTION

The order of the Court of Appeals was entered February 18, 1954 (R. 1033). The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power

Act and 28 U.S.C. Section 1254 (1), 49 Stat 860, 16 U.S.C. 825 (1).

QUESTIONS PRESENTED

1. Did the Federal Power Commission have jurisdiction, power, and authority to authorize and to license the construction, operation, and maintenance of the proposed project in the absence of state authority to use, impound, and divert the waters of the Deschutes River, an internal, nonnavigable stream of the State of Oregon?

2. Did the United States Constitution delegate to the central government power to control the acquisition and use of nonnavigable streams?

3. Whether under the Desert Land Act of 1877 the Federal Government irrevocably and unconditionally surrendered or relinquished to the states, including the State of Oregon, whatever rights the government may have had to control the use of the waters of nonnavigable streams?

4. Whether under the Desert Land Act of 1877 the common law doctrine of riparian rights have been abrogated in Oregon?

5. Whether the Federal Power Commission may act as a substitute for the local authorities over such questions as the right to use, appropriate, divert, or impound the waters of nonnavigable streams?

6. Whether an applicant for a license under Section 9 (b) of the Federal Power Act must show the Federal Power Commission he has under the state law the right

to divert the waters of a nonnavigable stream for the use of which he desires a license?

STATUTES INVOLVED

The statutes involved are adequately set forth in the Appendix to Petitioner's brief.

ADDITIONAL STATEMENT

The Deschutes is an interior, nonnavigable river of the State of Oregon and is a tributary of the Columbia River (R. 330). A setting forth of some general facts relative to the geography, topography and stream flow may be helpful in understanding the issues of this case.

The Deschutes River rises near the summit of the Cascade Range and flows northward along the foot of the eastern slope to join the Columbia River at a point about 15 miles upstream from The Dalles, Oregon. The drainage basin, with an area of about 10,500 square miles, has a shape somewhat like an inverted Y, and Little Deschutes River forms the drainage pattern of the western arm. Twenty miles below its junction with Little Deschutes River, the main stream flows through Bend, the most important city in the basin (R. 327).

About 55 miles north of Bend, two important tributaries, the Metolius and Crooked Rivers join the main stream, from the west and east, respectively, and at that point the flow from springs greatly augments the run-off which is depleted by irrigation diversions above Bend. Only two other important tributaries, Warm Springs River and White River at mile 84 and mile 47, respec-

tively, enter the stream below Bend. Most of the basin is covered with timber, and this timbered area includes all of Deschutes National Forest, and portions of Mt. Hood and Ochoco National Forests. Topography of the basin is generally broken and rugged, except for the Central Oregon plateau and the comparatively level bench lands in the mid-valley section. Throughout the lower 130 miles, the river flows in a narrow canyon with an average fall of 17.6 feet to the mile. The agricultural lands consist largely of high table lands cut by deep canyons through which the rivers flow and small arable areas which border the streams. The soil is a coarse, disintegrated lava and the rocks of the entire area are volcanic and very porous. The river valley varies in width from 200 to 1,200 feet (R. 328).

The geological formations, being porous in nature, act as underground reservoirs regulating run-off from the basin. The Deschutes River has perhaps the most uniform flow of any river of comparable size in the Columbia River Basin, and has a maximum discharge near Madras, which is in the vicinity of the proposed project, of about 13,300 cubic feet per second, the minimum at the same point being about 2,900 cubic feet per second. The mean annual run-off near Madras is 3,011,800 acre-feet, and the average flow is about 4,200 cfs (R. 328).

Flow in the Deschutes is remarkably uniform, and because of the geological conditions in the basin, large floods are not regarded as probable in any part of the basin except on Crooked River, which enters the De-

schutes from the east at mile 113, or about 10 miles above the proposed project. No floods causing major damage are known to have occurred (R. 328).

Metolius and Warm Spring Rivers are the principal salmon supporting tributaries of Deschutes River. These streams support runs of spring Chinook salmon and steelhead trout. Falls and dams above the confluence of Metolius River block the upstream passage of anadromous fish. The Oregon Fish Commission has constructed and put into operation a salmon hatchery on Metolius River. The Deschutes River has numerous rainbow, cutthroat, German brown trout, steelhead and salmon and is nationally known for its sport fishing (R. 329).

Seasonal low flows of Deschutes River and its tributaries above Bend are completely appropriated and are used primarily for irrigation of lands lying east of the river (R. 329).

The proposed project, frequently referred to as the Pelton Project, would consist of a principal structure or generating dam, power plant, generators, switching station, and other facilities and a "re-regulating" dam to be constructed three miles below the power dam (R. 417-447).

In Petitioner's statement on page 7 of the brief, it is stated, "No use of the waters of the Deschutes River will be made by or at the 're-regulating' structure nor is there objection directed to it."

In this, counsel for the Petitioner are in error. The respondents have consistently and repeatedly objected to

the project, as such, in its entirety (R. 310, 431, 497, 500). The Petitioner has, throughout these proceedings, treated the Pelton Project as a unit consisting of both the main and the re-regulating dams (R. 431).

On January 20, 1948, four months prior to the filing of its application with the Federal Power Commission, the Northwest Power Supply Company filed with the Hydroelectric Commission of Oregon an application for a preliminary permit, Project No. 170, commonly known as the Pelton Project, for authority to appropriate 7,040 cubic feet per second of water from the Deschutes River for the purpose of developing 120,000 theoretical horsepower under a head of 150 feet and to construct a dam and powerhouse at the Pelton Site.

This application was filed in compliance with the terms of Oregon Revised Statutes Sec. 543.110 et seq., which, in substance, provides that no water-power project involving the right to use or appropriate the waters of any rivers or other bodies of water within the State of Oregon, for the generation of electricity shall be begun or constructed except in conformity with the provisions of said Act, which, among other things, provides for the issuance of a preliminary permit by the Oregon Hydroelectric Commission before any such water-power project shall be initiated.

Oregon Revised Statutes Sec. 509.640, provides in substance that in the event any person desires to construct a dam in any of the streams of Oregon to a height that will make a fish ladder or fishway thereover imprac-

ticable in the opinion of the Oregon Fish Commission, then such person may make an application to the Commission for a permit to construct the dam. The Oregon Fish Commission is authorized to grant such permit in its discretion on the condition that the person so applying for such permit shall convey to the State of Oregon a site of the size and dimensions satisfactory to the Fish Commission, at such place as may be selected by said Commission, and shall erect thereon a hatchery residence in accordance with plans and specifications to be furnished by the Commission. The act further provides that such person shall enter into an agreement with the Commission secured by bond to furnish all water and light without expense, to operate said proposed hatchery. This act further provides that the Fish Commission shall not issue a permit for the construction of any such dam until the person applying for such permit shall have actually conveyed said land to the State and shall have erected said hatchery and hatchery residence thereon in accordance with said plans and specifications.

BRIEF OF AUTHORITIES

I

The rivers and streams of water in the territory of Oregon in which salmon are found shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.

Act of Congress (August 14, 1848, Territory of Oregon Act.) 9 Stat. L. Sec. 12, Ch. 177, p. 328.

II

"All laws in force in the territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force until altered or repealed."

Article XVIII, Sec. 7, Constitution of Oregon, 1859.

III

In the event that any person desires to construct a dam in any of the streams of this state to a height that will make a fish ladder or fishway thereover impracticable, in the opinion of the commission, then such person may make an application to the commission for a permit to construct such dam, and the commission is hereby authorized to grant such permit in its discretion, upon the condition that the person so applying for such permit shall convey to the state of Oregon a site of the size and dimensions satisfactory to the commission, at such place as may be selected by the commission, and erect a hatchery and hatchery residence, according to plans and specifications to be furnished by the commission, and enter into an agreement with the commission, secured by a good and sufficient bond, to furnish all water and light without expense, to operate said proposed hatchery; and no permit for the construction of any such dam shall be given by the commission until the person applying for such permit shall have actually conveyed said land to the state and erected said hatchery and hatchery residence in accordance with said plans and specifications.

Oregon Revised Statutes Sec. 509.640.

IV

The common-law doctrine of riparian rights has been virtually abrogated in Oregon and for practical purposes appears to be no longer more than a legal fiction.

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 164, 79 L. Ed. 1356,
Jennison v. Kirk, 98 U.S. 453, 25 L. Ed. 240,
Atchinson v. Peterson, 20 Wall. 507, 22 L. Ed. 414.

V

All waters within the state (Oregon) from all sources of water supply belong to the public.

Oregon Revised Statutes Sec. 537.110

VI

The above section abolishes the rule that a riparian owner has the right to have a stream continue to flow substantially undiminished in its natural channel.

California-Oregon Power Co. v. Beaver Portland Cement Co., 73 Fed. 2nd 555.

The common-law rule as to "continuous flow" of a stream, or riparian doctrine, may be changed by statute except as such change may affect some vested right.

Re: *Water Rights of Hood River*, 114 Or. 112, 227 P. 1065.

VII

The Oregon water code has been sustained as constitutional by the Supreme Court of the United States.

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 79 L. Ed. 1356.

VIII

The rights, title and interest in and to all water for the development of water power and to water power sites, which the state of Oregon now owns or may hereafter acquire, shall be held in perpetuity.

Article XI-D, Sec. 1, Constitution of Oregon, 1859.

IX

The Desert Land Act (Act of Congress, March 3, 1877, amended 42, U.S.C.A. 321) had the effect to sever all waters upon the public domain, not theretofore appropriated, from the land itself.

California-Oregon Power Co. v. Beaver Portland Cement Co. (supra)

Brush v. Commissioners of Internal Revenue, 300 U.S. 352.

Ickes v. Fox, 300 U.S. 82, 57 S Ct. 412.

X

Under the Federal Acts of 1866, 1870 and 1877 (Title 43, Section 661, United States Code Annotated (14 Stat. 251, 16 Stat. 217)) the federal government irrevocably and unconditionally surrendered or relinquished to the states whatever rights the government may have had to control the use of waters of nonnavigable streams in the West.

Jennison v. Kirk, 98 U.S. 453, 25 L. Ed. 240,

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S. Ct. 725,

Atchinson v. Peterson, 20 Wall. 507, 22 L. Ed. 414,

Basey v. Gallagher, 20 Wall. 670, 22 L. Ed. 452,

Broder v. Natoma Water and Mining Company, 11 Otto 274, 25 L. Ed. 790,

United States v. Rio Grande D. & I. Company, 174 U.S. 690, 706, 19 S. Ct. 770,

Gutierres v. Albuquerque Land & Irrigation Co., 188 U.S. 545, 553, 23 S. Ct. 338.

XI

The power to legislate on the question of the acquisition and control of water rights has never been delegated

to the United States and hence such power properly belongs to the individual states.

Kansas v. Colorado, 206 U.S. 46, 94,
Fox v. Ickes, 137 Fed. 2nd 30.

XII

From and after the date when this act takes effect no right to appropriate or to use the waters of the lakes, rivers, streams or other bodies of water within the state of Oregon, including water over which this state has concurrent jurisdiction, in connection with the development of any water-power project for the generation of electricity, shall be initiated, perfected, acquired or held, except for and during the period or periods or extensions thereof as herein stated, and pursuant to the provisions hereof. (Ore. L. 1931, ch. 67, sec. 2, p. 82)

Oregon Revised Statutes Sec. 543.110 et seq.

XIII

The refusal of the Fish Commission of Oregon and the Oregon Hydroelectric Commission to approve the Pelton Project is an absolute bar to the licensing of the proposed project. Sec. 9 (b) Federal Power Act (16 U. S. C. A. 802 b.)

First Iowa Hydroelectric Cooperative v. Federal Power Commission, 328 U.S. 152.

State of Iowa v. Federal Power Commission, 399 U.S. 979.

XIV

Riparian water rights, like oth .r real property rights, are determined by state law. Title to them is acquired in conformity with that law.

Federal Power Commission v. Niagara Mohawk Power Corporation, 347 U.S. 239, 74 S. Ct. 487.

XV

The legislative history of the Federal Power Act compels conclusion that it was not intended to automatically abolish pre-existing water rights on a nationwide scale, but that it was intended to be merely regulatory.

Federal Power Commission v. Niagara Mohawk Power Corporation, 347 U.S. 239, 74 S. Ct. 487.

XVI

Rights of federal government in navigable waters within the several states is limited to control thereof for purposes of navigation.

United States v. Twin City Power Co., 215 F.2d 592.

ARGUMENT

INTRODUCTION:

The respondents contend that under the Desert Land Acts (43 U.S.C.A. 321), the federal government irrevocably and unconditionally surrendered and relinquished to the State of Oregon whatever rights the government may have had to control the use of the waters of its nonnavigable streams; that common law rule as to "continuous flow" of a nonnavigable stream, or riparian doctrine, has been changed by statute and laws of the state of Oregon; that said Desert Land Acts had the effect to sever all waters upon the public domain from the land itself; that the rights, title and interest in and to all waters of the State, and the right to regulate its use, are vested in the State; that the State of Oregon has refused to license the proposed project; that under Section 9 b of the Federal Power Act (16 U.S.C.A. 802 b), the refusal of the State to approve the project is an absolute bar to the licensing of the project by the Federal Power Commission.

THE DESERT LAND ACT (ACT OF CONGRESS, MARCH 3, 1877, AMENDED 43, U.S.C.A. 321) HAD THE EFFECT TO SEVER ALL WATERS UPON THE PUBLIC DOMAIN, NOT THERETOFORE APPROPRIATED, FROM THE LAND ITSELF.

From the system of state control, enormous property rights have been developed in the West. This Court has consistently recognized that rights of water secured in conformity with state laws are vested property rights. (*Federal Power Commission v. Niagara Mohawk Power Corporation* supra.) There is no provision in the federal constitution delegating to the central government power to control the acquisition and use of nonnavigable streams. The government, recognizing this position, has on occasion claimed that the United States has proprietary title in water and hence full power to dispose of and regulate such waters.

In the case of *Kansas v. Colorado,* 206 U.S. 46, the United States invoked this provision (Clause 2, Section 3, Article IV, United States Constitution) in support of its claim of national control as asserted in that case. The Court there, after referring to the constitution provision said (p. 89): "The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. * * * clearly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the

property belonging to the United States within their limits."

Referring to this constitutional provision, i.e., power in the federal government to control the acquisition and use of water it was said in *Ashwater v. Tennessee Valley Authority*, 297 U.S. 288, 388, 56 S. Ct. 466:

> "The constitutional provision is silent as to the method of disposing of property belonging to the United States. That method, of course must be an appropriate means of disposition according to the nature of the property, it must be one adopted in the public interest as distinguished from private or personal ends, and we may assume that it must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the states."

The state has taken the position that under the Federal Acts of 1866, 1870 and 1877, the federal government irrevocably and unconditionally surrendered or relinquished to the states whatever rights the government may have had to control the use of the waters of non-navigable streams in the West. The first of these Federal Acts, that of July 26, 1866 (14 Stat. 251) and the second, that of July 9, 1870, (16 Stat. 217), are codified together as Section 661, Title 43, United States Code, which reads as follows:

> "Whenever, by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local

customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purpose herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section."

The first paragraph of the above quoted section is from the original Act of 1866. The second paragraph is from the amendatory Act of 1870 and had for its purpose the clarification of the 1866 statute.

The third pertinent federal act is the so-called "Desert Land Law" (Act of March 3, 1877, as amended, 43 U.S.C.A. 321), which, after providing for desert land entries, reads as follows:

"* * * Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all

surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights."

Section 2 and Section 3 of this 1877 Act (19 Stat. 377) further provides:

"Section 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated—

"Section 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

The historical background of the Acts of 1866, 1870 and 1877 has been related many times. *Jennison v. Kirk*, 98 U.S. 453, 25 L. Ed. 240, decided in 1879 contains an account of the 1866 law by Justice Field who did much to mold the form of the earlier decisions. It was there said (*Jennison v. Kirk*, supra): "The doctrines of the

common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains."

With reference to the 1866 Act the decision had this to say:

> "It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established to which the people were attched."

A more recent decision, *California-Oregon Power Company v. Beaver Portland Cement Company,* 295 U.S. 142, 55 S. Ct. 725, decided in 1935 reviews the conditions in the West which lead to the passage of these three federal Acts and states (295 U.S. 157-158):

> "The streams and other sources of supply from which this water must come were separated from one another by wide stretches of parched and barren land which never could be made to produce agricultural crops except by the transmission of water for long distances and its entire consumption in the process of irrigation. Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation. And this substitution of the rule of appropriation for that of the common law was to have momentous consequences. It became the determining factor in the long struggle to expunge from our vocabulary the legend "Great American Desert" which was spread in large letters across the face of the old maps of the far west."

In *Atchinson v. Peterson*, 20 Wall. 507, 22 L. Ed. 414, Justice Field after referring to the silent acquiescence of the United States in permitting the occupation of the public lands for mining and appropriation of water in connection with those operations said (22 L. Ed. 416, 20 Wal., 507, 513): "This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866."

In *Basey v. Gallagher*, 20 Wall. 670, 683, 684; 22 L. Ed. 452, the same judge referred to the 1866 Act and said:

> "It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or the decisions of the courts."

In *Broder v. Natoma Water and Mining Company*, 11 Otto 274, 276; 25 L. Ed. 790, it was held that the Act of 1866 was "rather a voluntary recognition of the pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

In *United States v. Rio Grande D. & I. Company*, 174 U.S. 690, 706, 19 S. Ct. 770, it was said: "Obviously by these acts so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow."

Likewise *Gutierres v. Albuquerque Land & Irrigation Company*, 188 U.S. 545, 553, 23 S. Ct. 388, held:

> "By the Act of March 3, 1877, c. 107, 19th Stat. 377, the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, was granted * * *".

In the case of *California-Oregon Power Company v. Beaver Portland Cement Company* (supra), the power company which had appropriation rights sued to enjoin the Cement company from interfering with the water of Rogue River in Oregon. The Court reviewed at length the conditions in the West which lead to the passage of the Acts of 1866, 1870 and 1877, and commented upon these Acts and the decisions construing them. The decision reached was that the appropriation rights of the defendant were good and hence the injunction could not issue. The Court thus summarized its decision (295 U.S. 142, 163, 55 S. Ct. 725):

> "What we hold is that following the Act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."

The doctrine of the *California-Oregon Power Company* decision has been reiterated in two subsequent opinions of the United States Supreme Court. We quote

from *Ickes v. Fox*, 300 U.S. 82, 95, 57 S. Ct. 412, wherein it was said:

> "The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water right; but all nonnavigable waters were reserved for the use of the public under the laws of the various arid-land states."

This same controversy involving the Yakima project in the State of Washington, came before the United States Court of Appeals for the District of Columbia and a decision was rendered by that court on June 30, 1943. The Secretary of Interior attempted to limit the amounts of water which the farmers could secure under contracts with the Bureau of Reclamation to 3 or 3½ acre-feet per acre and to impose an additional charge if more water was desired. The Secretary had urged that the United States was an indispensable party, but the Supreme Court ruled otherwise holding (300 U.S. 82, 95, supra) that the appropriation of water was not for the use of the Government, but, under the Reclamation Act, for the landowners, and that the Government was simply a carrier and distributor of water with a lien upon the land and the water rights as security to assure the

repayment of the cost of construction and maintenance. The United States Court of Appeals (*Fox v. Ickes*, 137 F.2d 30) ruled against the Secretary, holding that in the operation of the project he is in the position of a carrier of water to all entrymen under the project and that "he must distribute the available water according to the priorities among the different users which are established by the law of the State of Washington." The Appellate Court went on to say that "the amount of water, to which appellants are entitled by reason of prior appropriations for beneficial use can only be finally determined by a court of the State of Washington."

The only true ownership in water is one of a right to use. Neither the United States nor any individual state can possess a true title unless and until a beneficial use of the water is made. This use is exercised by an individual, a group of individuals, or a legal entity through beneficial application of the water in compliance with state laws.

The effect of the dedication of the waters of the state to the state or to the people confers no ownership of title in the running waters flowing within such respective jurisdiction. Neither the United States, a state, nor an individual can, under the law, acquire any absolute ownership or title to the waters flowing in their natural channels. The only right that can be acquired by any one is usufructuary. Again, such a dedication confers upon the state no absolute title or right even to the use of such waters. The public ownership, if any distinction

is made, is rather of sovereign than that of a proprietor. Therefore, such a dedication confers upon the state the power of administration or regulation of the waters flowing within its boundaries, and also the power of regulating the appropriation and use of such waters as between the respective individual claimants thereto. In other words, the state acts under these terms of dedication in its sovereign capacity only, and not as proprietor or owner of the water.

A constitutional and statutory provision dedicating water to the public should be construed as meaning the same as the phrase publici juris, that the water is a wandering thing whose corpus is incapable of ownership either by the state or the United States, the utmost right being usufructuary and subject to acquisition by any member of the public first applying in conformity with state regulations. *Federal Power Commission v. Niagara Mohawk Power Corporation* (supra).

These principles are in strict conformity with the 1935 decision of the United States Supreme Court in *California-Oregon Power Company* (supra), wherein it was said that by virtue of the Act of 1877, if not before, the waters of nonnavigable streams "became publici juris subject to the plenary control of the designated states."

THE WATERS OF THE STATE OF OREGON MAY NOT BE APPROPRIATED WITHOUT ITS CONSENT.

Section 543.110, Oregon Revised Statutes, provides as follows: From and after the date when this act takes effect no right to appropriate or to use the waters of the lakes, rivers, streams or other bodies of water within the state of Oregon, including water over which this state has concurrent jurisdiction, in connection with the development of any water-power project for the generation of electricity, shall be initiated, perfected, acquired or held, except for and during the period or periods of extensions thereof as herein stated, and pursuant to the provisions hereof.

Section 543.120, Oregon Revised Statutes, reads as follows: From and after the taking effect of this act, no waterpower project involving the use of the waters of any of the lakes, rivers, streams or other bodies of water within the state of Oregon, including water over which this state has concurrent jurisdiction, for the generation of electricity, shall be begun or constructed except in conformity with the provisions hereof.

The Federal Government has only such powers as are delegated to it by the United States Constitution. All powers not so delegated are by the express provisions of the Tenth Amendment reserved to the states. The power to legislate on the question of acquisition and control of water rights in nonnavigable streams has never been delegated to the United States and hence such power properly belongs to the individual states. This position

was definitely decided in *Kansas v. Colorado* (supra), wherein it is said:

> "It (a state) may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State."

This principle was followed in the *California-Oregon Power Company* case (supra), the court holding that: "The full power of choice must remain with the state." To the same effect are *United States v. Rio Grande Dam and Irrigation Company*, 174 U.S. 690, and *Gutierres v. Albuquerque Land and Irrigation Company*, 188 U.S. 545.

The State of Oregon, by constitution and statute in the adoption of its water code, has determined this right in favor of the appropriation doctrine. Oregon Revised Statutes 537.110; Article 11-D, Sec. 1, Constitution of Oregon, 1859. *Federal Power Commission v. Niagara Mohawk Power Corporation* (supra).

Constitution Article 11-D, Section 1, Oregon Constitution, provides the rights, title and interest in and to all water for the development of waterpower and to waterpower sites, which the State of Oregon now owns or may hereafter acquire, shall be held in perpetuity.

Oregon Revised Statutes 537.110 provides:

> "All waters within the state (Oregon) from all sources of water supply belong to the public."

Under the laws of this state, applicant may not appropriate or use the water of the state in connection with the devolpment of any water-power project for the generation of electricity without first having obtained from the Hydroelectric Commission of the State of Oregon a license so to do.

THE FEDERAL POWER COMMISSION HAS NO AUTHORITY TO GRANT TO THE PORTLAND GENERAL ELECTRIC COMPANY, THE APPLICANT, A LICENSE TO CONSTRUCT THE PROJECT IN QUESTION UNTIL THE APPLICANT HAS COMPLIED WITH SECTION 9 (b) OF THE FEDERAL POWER ACT BY SHOWING COMPLIANCE WITH THE LAWS OF THE STATE OF OREGON.

This proposition was decided by this court in *First Iowa Hydroelectric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946). The supersedure by the Federal Power Act of conflicting state laws was further emphasized by the denial of certiorari when the State of Iowa attempted for the second time to impose its own statute in opposition to the federal license for this project, *State of Iowa v. Federal Power Commission*, 399 U.S. 979 (1950), in which certiorari was denied thereby affirming the decision of the United States Court of Appeals for the Eighth Circuit, affirming order of the Commission granting the license. 173 Federal 2d, 421 (1949).

In the first *Iowa Hydroelectric case* (supra), petitioner applied to the Federal Power Commission for a license for a power project in Iowa involving the construction of

a dam on a navigable* stream and the diversion of water from two navigable* streams into another. Petitioner showed no attempt to comply with the Iowa Code, 1939, chapter 363, which forbids the construction of dams and the diversion of water for industrial purposes without a permit from the State Executive Council and authorizing the issuance of such permit upon the finding inter alia, that "any water taken from the stream * * * is returned thereto at the earliest practicable place." The State intervened and urged that the application be denied because the petitioner did not submit evidence of its compliance with the requirements of the Iowa Code for a permit from the State Executive Council. The Federal Power Commission found that a federal license for the project was required under the Federal Power Act and that the project called for practical and reasonably adequate water power development with certain recreational advantages, all at a cost not appearing to be unreasonable; but it dismissed the application without prejudice on the ground of petitioner's failure to present satisfactory evidence, pursuant to Section 9 (b) of compliance with requirements of the laws of Iowa requiring a state permit.

The Court held that compliance with the requirements for a state permit under the Iowa Code is not a condition precedent to, or an administrative procedure

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* Emphasis supplied.

that must be exhausted before, securing a federal license. In discussing this point the Court said: "It is the Federal Power Commission rather than the Iowa Executive Council that, under our constitutional government, must pass on issues affecting the use of navigable* waters—on behalf of the people as well as on behalf of all others." (p. 182)

The securing of an Iowa State permit is not in any sense a condition precedent or an administrative procedure that must be exercised before securing a federal license. It is a procedure required by the State of Iowa in dealing with its local streams and also the water of the United States within that state in the absence of an assumption of jurisdiction by the United States over the navigability* of its waters. Now that the federal government has taken jurisdiction of such waters (navigable waters) under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements." (p. 170)

In the *Niagara Mohawk Case* (supra) the United States Court of Appeals in rejecting the contention of the petitioner that the Federal Power Act had superseded state water laws said (p. 32):

> "Much of the difficulty in this case has arisen from what we regard as a misconception of the Water Power Act and of the nature of licenses issued thereunder. The Act is purely a regulatory measure. A federal license is not an original grant of authority,

* Emphasis supplied.

but a permission to use a state's grant of authority. To be sure, a license is a prerequisite in that water rights under state law in a navigable stream may not be exercised without one, as the Supreme Court held in the New River case. And when state law or regulation conflicts with the Act, or with any lawful federal regulatory action, or with lawful terms of a federal license, state authority must yield to federal, as the Supreme Court held in the First Iowa case. But these considerations do not by any means require the conclusion that the Act and a license thereunder constitute the source from which all water rights flow. An applicant for a license must show the Commission he has under state law the right to divert the water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him."

The court in affirming the decision of the lower court in that case said (p. 495):

"The references in the Act to pre-existing water rights carry a natural implication that those rights are to survive, at least until taken over by purchase or otherwise. Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that Act.

The legislative history of the Act discloses no substantial support for the drastic policy which the Commission seeks to read into it. To convert this act from a regulatory Act to one automatically abolish-

ing pre-existing water rights on a nation-wide scale calls for a convincing explanation of that purpose. We find none. In fact, the legislative history points the other way."

In the dissenting opinion Mr. Justice Douglas (p. 498) stated, "And I agree that the Federal Power Act was not intended to interfere with water rights created by state law."

CONCLUSION

The Respondents respectfully submit that the Federal Power Act was not intended to abolish pre-existing water rights on a nation-wide scale, but that it was intended to be merely regulatory; that by adoption of the Federal Power Act Congress did not and could not change state ownership or control of waters located within the State; that the sovereignty of Oregon extends over control of waters located within the state; that as owner of public domain, federal government possessed power to dispose of land and water thereon together or to dispose of them seperately, and fair construction of the Desert Land Act is that Congress intended to establish the rule that, for the future, land should be patented separately and that all nonnavigable waters thereon should be reserved for the use of the public under laws of the state and territories named; that regulation of the Deschutes River as it flows through Oregon is one of the powers of Oregon's sovereignty, and such power includes power to regulate fish in Oregon waters; that the decision

of the Court below is in accord with the well-recognized, long-standing principles laid down by this Court and, therefore, the judgment of the Court below should be affirmed.

Respectfully submitted,

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